IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO. 415 OF 1987
With
FIRST APPEAL NO. 418 OF 1987
With
CIVIL APPLICATION NO. 505 OF 1987
With
CIVIL APPLICATION NO. 509 OF 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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THE ORIENTAL FIRE AND GENERAL INSURANCE CO. LTD. - Appellant(s)
Versus
MADHUBEN SHANABHAI & ORS. - Respondent(s)

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Appearance :
Shri Rajni H. Mehta for Appellant(s).
None for Respondent Nos. 1 – 6 and 10.
Shri R. R. Marshall for Respondent No.7.
Name of Respondent No. 8 has already been deleted.
Respondent No.9 though is represented by Shri G.A. Malik, but, Shri G.A. Malik is absent.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 26/07/2007

COMMON ORAL JUDGMENT

1. First Appeal Nos.415 of 1987 and 418 of 1987 are taken up for hearing along with Civil Application Nos.505 of 1987 and 509 of 1987.

In each of the First Appeals, an application under Order XLI, Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to "the Code" for short) has been filed along with a copy of the policy with a submission that the said policy be taken on record as additional evidence.

2. The short facts necessary for disposal of the applications and the appeals are that on 6th October, 1981, on Ambaji – Khedbrahma road, near Chhikhla-Ghatri, an accident took place between a private matador bearing Registration No.GJU-8335 insured by respondent No.7-United India Insurance Company Limited and a private jeep car bearing Registration No. GJU-5117, said to be insured by the appellant-Insurance Company. The persons travelling in the vehicles had filed their claim petitions on the ground that the driver of each of the vehicles was rash and negligent, that the accident was a result of irrational driving and

that the passengers were carried either in the matador, so also in the jeep car, for payment of hire and reward. As many as ten claim cases were filed, some of the claims were allowed, five appeals out of the decisions came to be filed by the insurer of the jeep car, i. e. present appellant – M/s. Oriental Insurance Company Limited, two appeals were disposed of on the ground of smallness of the amount awarded. First Appeal No.419 of 1987 was withdrawn without prejudice to the contentions to be raised in First Appeal Nos.415 of 1987 and 418 of 1987.

3. The Insurance Companies, as party defendants, had raised the pleadings that they had insured the private vehicles and as the passengers were being carried for hire and reward, the Insurance Company of the particular vehicle was not answerable to the claim made by the passengers travelling in the vehicle insured with the respective Insurance Company.

4. The learned Tribunal below, after recording the evidence and hearing the parties, held that the Insurance Company, namely, United India Insurance Company Limited would not be answerable to the claim made by the vehicle insured by it, namely, matador bearing Registration No.GJU-8335. The learned Tribunal, however, held that in absence of production of the policy by the present appellant, the present

appellant – Oriental Fire and General Insurance Company would be answerable to the claim made by the passengers travelling in the jeep car. The learned Tribunal also held that it would also be answerable to make payment to the passengers travelling in the matador because the passengers travelling in the matador were third parties to the present appellant. The present appellant, being aggrieved by the said judgement and award, is before this Court.

5. Shri Rajni Mehta, learned Counsel for the appellant, submitted that for the reasons stated in the application, the insurance policy could not be produced before the lower Court, but, in view of the undisputed facts that the jeep car was insured with the appellant, the policy deserves to be taken on record.

6. The claimants-respondents, drivers of the vehicles, despite service are not in attendance and therefore, there is no opposition from their side.

7. The respondent No.7 – United India Insurance Company Limited, in the opinion of this Court, would not be entitled to challenge production of the policy as additional evidence because by production of the policy, the present appellant is trying to avoid its liability *qua* the

claimants, who were travelling in the jeep car. Even assuming that respondent No.7 – United India Assurance Company Limited is entitled to raise an objection against production of the insurance policy, then too, such an objection can straightway be rejected in view of the admitted position that the vehicle, i. e. jeep car was insured with the present appellant.

8. Order XLI, Rule 27 of the Code reads as under:

> "***27. Production of additional evidence in Appellate Court***. - *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -*
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> *(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
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> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
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> *(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,*
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> *the Appellate Court may allow such evidence or document to be produced, or witness to be examined.*

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

Clause (b) of sub-rule (1) of Rule 27 of Order XLI clearly provides that a Court would be entitled to receive additional evidence where the Court requires any document to be produced to enable it to pronounce judgement, or for any other substantial cause. Clause (b) of Sub-rule (1) of Rule 27 of Order XLI clearly provides that the parties to the appeal shall not entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but, if the Court requires it, the Court may receive it and if the party proves that for a substantial cause, the document is required to be taken on record, then, the Court can take the document on record. It is further to be seen that if the document is taken on record, it would not reopen the dispute, nor would it require further evidence in the matter because it is admitted case between the parties that the jeep car was insured with the present appellant. Once the Court is of the opinion that the insurance policy should form an integral part of the records to decide the dispute finally in accordance with law and without causing any prejudice to the parties, then, such evidence would become requirement for the Court and the Court would be entitled to receive such document as additional evidence.

9. Exercising my powers under Rule 27 of Order XLI of the Code in each of the cases, I take the policy on record. Accordingly, the Civil Applications are allowed.

10. Shri Rajni Mehta, learned Counsel for the appellant, submitted that in view of the policy and the legal position, it would be clear that the Insurance Company would not be answerable to the claim made by the passengers of the vehicle if such passengers were carried in the insured vehicle for hire or reward. The provisions of the Motor Vehicles Act, 1988 and the covenants in the policy would clearly provide that the Insurance Company would not be required to insure the insurer or the vehicle if it is a private vehicle and is used as a public vehicle or where the passengers are carried for hire or reward. If the owner of the vehicle wants to say that he would carry the passengers for hire and reward, then, he will have to seek the policy for such vehicle where the passengers can be carried for hire or reward.

11. In the present matter, the jeep car was registered as a private vehicle and as a private vehicle, it could not carry the passengers for hire or reward. It is also to be seen from the judgement of the lower Court that respondent No.7 has been exonerated on the same principle and logic against the claim made by the passengers of the matador on

the plea that the passengers in matador were being carried for hire or reward and respondent No.7 had not insured the vehicle as a public carrier.

12. Applying the said analogy, I must hold that the appellant-Insurance Company would not be answerable to the claim made by the passengers travelling in the jeep car, which was insured with the present appellant.

13. The question still would be that whether the passengers of the jeep car should be left remediless or should this Court exercise its powers under Rule 33 of Order XLI of the Code. Even for the sake of repetition, I will state that the present appellant has been held liable to the claim made by the passengers of the matador on the ground that such passengers, even if were travelling for hire or reward in the said matador, would be third parties for the Insurance Company of the jeep car.

14. Rule 33 of Order XLI of the Code defines the powers of the Court of appeal. It reads as under:

> ***33. Power of Court of Appeal*** *– The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such*

further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

What powers can be exercised by the Appellate Court always had been a subject of interesting discussion by various High Courts and the Supreme Court. All the Courts are unanimous in their decisions and in holding that the Appellate Court has powers to modify the relief and if required, it can decide the dispute between the co-respondents. The Courts have decided that in a given case, where the appeal of the appellant is to succeed, then, the respondent can be held liable against the co-respondent. The Apex Court, however, has cautioned all the Appellate Courts to exercise the powers with due care and caution. The Apex Court has observed that though powers under Rule 33 of Order XLI of the Code are appellate powers of the Court or are superior/*suo motu*

appellate powers of the Appellate Court, the same should not be exercised just for nothing.

15. Shri Rajni Mehta, learned Counsel for the appellant, placing reliance upon a judgement of the Supreme Court in the matter of ***Mahant Dhangir & Anr. vs. Shri Madan Mohan & Ors.***, reported in ***AIR 1988 SC 54***, has submitted that present is a fit case where this Court should exercise its powers under Order XLI, Rule 33 so that the claimants are not left without any remedy.

In the said matter, the question before the Supreme Court was that if the cross objections are not filed, then, whether powers under Rule 33 of Order-XLI can be exercised by the Appellate Court. The Supreme Court observed that the scope of Rule 22 in relation to cross objections and the scope of Rule 33 in relation to the appellate powers of the Court are totally different. The same are not mutually exclusive, they are closely related with each other. The Supreme Court observed that if objections cannot be urged under Rule 22 against the co-respondent, Rule 33 could take over and come to the rescue of the objector. The Supreme Court further observed that the Appellate Court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower Court. The observations made by the Supreme Court

are as under:

> *"If the cross-objection filed under Rule 22 of Order 41 C.P.C. was not maintainable against the co-respondent, the Court could consider it under Rule 33 of Order 41 C.P.C. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against*

any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

16. Shri Mehta, learned Counsel for the appellant-Insurance Company, submits that once his appeal is allowed, then, the appellant-Insurance Company is not required to plead to protect the interest of or in favour of the claimants-respondents, but, present is a case where the appellants, through their Counsel, would be failing in their duty if they do not protect their interest and of those who are relying upon the discretion of the Court and the responsibility of the Insurance Company.

17. Shri R.R. Marshall, learned Counsel for the respondent-Insurance Company, placed his reliance upon certain judgements of the Supreme Court, to submit that the Appellate Court can exercise its powers under Order XLI, Rule 33 if the appeal is maintainable and such argument is available to the Insurance Company. According to him, the appeal filed by the present appellant is not competent against respondent No.7, therefore, such an argument is not available to the appellant in the interest of the claimant/respondent. According to him, the powers are to

be exercised sparingly and not for the sake of asking.

18. So far as the maintainability of the appeal is concerned, I must hold that the appeal is maintainable and therefore only, the appeal of the appellant has been allowed. It would be a fallacious submission that the appeal is not competent, therefore, the Court should not exercise its powers under Rule 33 of Order XLI of the Code. Once the High Court held that the appeal is maintainable and allowed it accordingly, exonerated the Insurance Company against the claim made by the inmates of the jeep car, then, the argument relating to maintainability of the appeal would not be available to respondent No.7.

19. The question before this Court is whether this Court should exercise its powers under Rule 33 of Order XLI of the Code. The moment the Court comes to the conclusion that in the event the appeal is allowed, some of the respondents, who have not filed any cross objections, are likely to suffer because the appeal stands allowed, then, the Court has to exercise its powers to protect the interest of the unprotected. Some times the cross objections are filed against the appellant to seek further and better relief. In a given case, where the cross objections are not maintainable against the co-respondent, the Court is entitled to exercise its powers under Rule 33 of Order XLI of the Code. In a given case, a particular plaintiff or claimant-respondent, who

was entitled to file the cross objections against the appellant or cross appeal against the appellant, if had not filed the cross objections or a cross appeal, then, his right to claim further and better relief against the appellant would be lost, but, his right to claim the relief against the co-respondent would not be lost because the cross objections, ordinarily, against the co-respondent would not be maintainable. It would be only for the Appellate Court to exercise the powers under Rule 33 of Order XLI of the Code and compensate for the injury, which is likely to be suffered by such non-appealing respondents who will be suffering if the appeal is allowed.

20. Shri Marshall, learned Counsel for the respondent, has referred to certain judgements of the Supreme Court which I will take hereinafter.

20.1 Placing reliance upon a judgement of the Supreme Court in the matter of ***Shankar Popat Gaidhani vs. Hiraman Umaji More (Dead) by L.Rs. & Ors.***, reported in ***AIR 2003 SC 1682***, it was contended that the Appellate Court would not be entitled to grant any additional decree in favour of a person who was entitled to file cross appeal or cross objections. In the said matter, the suit for specific performance of contract for sale of land was decreed without any

direction for delivery of the possession in favour of the purchaser because the property was alleged to be in the possession of the tenants. Being aggrieved by the said decree, the vendor preferred an appeal, the appeal was dismissed, but, however the Appellate Court directed that the possession be also given to the non-appealing respondent/plaintiff. The Apex Court, in such circumstances, observed that present was not a case for exercise of powers under Rule 33 of Order XLI of the Code. There, the Court was not adjusting the equities between the co-respondents. The case on hands before the Supreme Court was a case where a particular relief was denied to the plaintiff and the appeal was filed by the defendant; he did not file any cross objections to seek further and better relief, nor filed an independent appeal to seek further and better relief.

20.2 Placing reliance upon a judgement of the Supreme Court in the matter of ***State of Punjab & Ors. vs. Bakshish Singh***, reported in ***(1998) 8 SCC 222,*** it was submitted that the power under Rule 33 has to be exercised cautiously and in rare cases where totally uncalled for decree or order has been passed by the lower Court. It is submitted by Shri Marshall that the Appellate Court cannot enlarge the scope of appeal in purported exercise of powers under Order XLI, Rule 33.

In the said matter, the question before the Supreme Court was altogether different. There, the Supreme Court was of the opinion that in a matter where a particular decree was to be passed and such decree has not been passed, then, the Appellate Court would be entitled to pass the decree, as ought to have been made by the subordinate or lower Court. The Supreme Court does nowhere say that if that decree is illegal and is required to be set aside, then, the Appellate Court either under its appellate powers or in its powers under Rule 33, would not be entitled to make the legal decree.

In the matter of ***State of Punjab*** (*supra*), the respondent had filed a suit against his dismissal from service, the trial court decreed the suit by holding that once absence from duty was regularised by grant of leave without pay, the absence could not be treated as misconduct. The Appellate Court affirmed the findings of the trial Court. The Appellate Court expressed an opinion that lesser penalty was warranted in the case and therefore, it remanded the case back to the punishing authority for passing a fresh order. The State filed a second appeal in the High Court, which was dismissed summarily and then, the appellant-State brought the matter before the Supreme Court wherein the Court noticed that the lower Appellate Court was inconsistent inasmuch as it upheld the findings of the trial Court that no charge survived after

regularisation of the respondent's absence, yet it remitted the case to the punishing authority for fresh consideration of penalty. The Supreme Court observed that powers under Article 142 are to be exercised as supplement and not to supplant what is not available. It also held that in such cases where a decree in a particular form was required to be made, the Court would be entitled to exercise its powers under Rule 33. The judgement in the matter of ***State of Punjab*** (*supra*), in fact, supports what has been said and argued by Shri Rajni Mehta.

20.3 Placing reliance upon a judgement of the Supreme Court in the matter of ***Chaudhary Sahu (Dead) by Lrs. vs. State of Bihar***, reported at ***AIR 1982 SC 98***, it was contended that in a case where a party was required to file cross objections if had not filed the cross objections, then, to give better benefit to non-appealing respondent or the respondent who had not filed the cross objections, the Court could not exercise the powers under Rule 33 of Order XLI of the Code.

In the said matter, the Collector, on the basis of the material placed before him, allowed certain units to the various landholders, who preferred an appeal before the Commissioner of the Division. However, the State Government, feeling satisfied and content with the order passed by the Collector, did not file an appeal. The Commissioner, in the

appeal filed by the landholders, while dismissing the appeal, held that the Collector was wrong in making certain observations in favour of the landholders, the Commissioner set aside the findings which were recorded against the interest of the landholders. The Apex Court held that in such a case, the powers under Rule 33 could not be exercised.

It is to be noted that where a person, who has a right of appeal or right to file cross objections against the appellant, if does not file cross appeal or cross objections, then, he cannot ask the Court to enlarge the relief in his favour under the provisions of Rule 33 of Order XLI. Rule 33 takes care of the situation where the respondent is not entitled to file cross objections against the co-respondent and the Court, in a given set of circumstances, feels that such a person should not be left remediless and in such circumstances, modifies the decree in favour of the non-appealing respondent against non-appealing co-respondent.

20.4 Shri Marshall has also placed reliance upon a judgement of the Supreme Court in the matter of ***Delhi Electric Supply Undertaking vs. Basanti Devi & Anr.***, reported at ***AIR 2000 SC 43***. In the said matter, on a complaint filed by Basanti Devi, widow of Bhim Singh, under Section 18 of the Consumers Protection Act, 1986, the State Commissioner by its judgement directed the Delhi Electric Supply

Undertaking to pay a sum of Rs.50,000/- with interest and however, exonerated the Life Insurance Corporation. The matter went upto the Supreme Court. After considering the earlier judgements, the Apex Court held that Rule 33 of Order XLI of the Code clothe the Appellate Court with extraordinary powers. The Apex Court, placing reliance upon a judgement in the matter of ***Mahant Dhangir*** (*supra*), held that the sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and the respondent, but, also between the respondent and the co-respondents. The Supreme Court in the said matter observed that the appeal filed by the Delhi Electric Supply Undertaking deserves to be allowed, but, the Insurance Company could not stand exonerated. The Supreme Court, exercising its powers under Rule 33 of Order XLI, allowed the appeal filed by the Delhi Electric Supply Undertaking, but, at the same time, directed the Insurance Company to make payment of the amount. It is in such case the powers under Rule 33 of Order XLI are required to be exercised. Once the Court finds that its interference in the appeal is likely to interfere with the rights of the non-appealing decree-holder/respondent and in a given case, such decree-holder - respondent would be entitled to the relief against the co-respondent, then, the Appellate Court under Rule 33 of Order XLI would be entitled to modify the decree to suit the purpose.

21. In the present case, I propose to exercise my powers vested in me under Rule 33 of Order XLI of the Code because I am of the opinion that if the present appellant-Insurance Company can be held liable to answer the claim made by the passengers of the matador insured by the respondent-Company treating the said passengers as third party against the present appellant-Company, then, the passengers travelling in the jeep car would also be third party against the Insurance Company of the offending matador.

22. Taking into consideration the totality of the circumstances, I hold that the present respondent No.7 would be answerable to the claim made by the inmates/passengers of the jeep car to the extent of the liability, as found by the Court below. If the present appellant-Insurance Company has discharged its liability under the award in favour of the passengers/inmates of the jeep car, then, they would be entitled to recover the said amount from respondent No.7 to the extent of 50% and to the extent of remaining 50% from the driver and/or owner of the jeep car. The two sets of respondents shall be liable to pay interest at the rate of 6% per annum in favour of the appellant from the date of deposit till the date of realisation.

23. In the results, both the appeals are allowed to the extent indicated above. No costs.

[R.S.Garg, J.]

*kamlesh**